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In the

Supreme Court of the United States

OCTOBER TERM 1961

No. 185

MIDESSA TELEVISION COMPANY, INC.,
Petitioner,

v.

MOTION PICTURES FOR TELEVISION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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July, 1961

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—RI 1-6711

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at *290 F. 2d 203*. There was no written opinion by the Judge of the District Court.

PRELIMINARY STATEMENT

The United States Court of Appeals for the Fifth Circuit has affirmed the judgment and decree of the District Court for the Western District of Texas (entered upon Respond-

ent's motion for summary judgment) which held that the judgment of the Supreme Court of the State of New York upon which Respondent herein sued, is entitled to full faith and credit under Article IV, Section 1 of the Constitution of the United States.

Petitioner has asserted as a ground for the issuance of a writ of certiorari that the New York judgment was obtained by fraud, thus raising anew a factual issue which was disposed of by both of the lower courts, the District Court, in its judgment, saying:

> "* * * The court having considered the pleadings, stipulations and documentary evidence on file, together with such affidavits and arguments of counsel, and finding that they show an absence of genuine issue of any material facts * * *"; (R. 115).

and the Court of Appeals, in its opinion having stated:

> "In addition nothing is stated in Defendant's Answer or otherwise shown which would support a claim of fraud even if that could be gone into. As the stipulated facts and the exhibits set out in the record show, defendant was notified of and given full opportunity to contest the motion of the plaintiff in the New York Supreme Court to amend the arbitration.
>
> "Further, a careful examination of the judgment and the record in respect to the amendment of the arbitration discloses no fact which supports the defendant's claim of fraud." *290 F. 2d 203, 205.*

Respondent seeks to have the Supreme Court take the up anew an issue of fact which has been fully laid to rest by the lower courts which have considered it. Not only is the decision of the Court of Appeals unquestionably correct, but, as will be shown below, no grounds exist for the issuance of a

writ of certiorari herein, since (a) the decision of the Court of Appeals herein does not conflict with applicable decisions of this Court, (b) such decision does not conflict with decisions of any other Court of Appeals, and (c) no substantial question under the Constitution of the United States is presented.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, upon a motion for summary judgment in an action on a mature judgment of a court of a soverign state, where the defendant alleges fraud in obtaining the judgment as a defense, and the District Court, in awarding summary judgment, finds no genuine issue of material fact, and the Court of Appeals unanimously affirms such judgment, the Supreme Court of the United States should review such determinations of fact.

2. Whether in an action on a mature judgment of a court of a sovereign state, which judgment was obtained and entered in accordance with the procedures prescribed by the laws of such state and after due notice having been given to petitioner, such judgment is entitled to full faith and credit and is immune to a collateral attack mounted upon vague allegations of fraud made by petitioner herein.

3. Whether the merits of a mature judgment of a sovereign state must be relitigated at any time that a defaulting party makes a general and nebulous allegation of "fraud" such as appears in this case.

STATEMENT

This is a suit brought in the United States District Court for the Western District of Texas on a mature judgment obtained by Respondent against Petitioner in the Supreme Court of the State of New York.

Since the relevant facts herein can be stated briefly and since they differ in many material respects from the statements and inferences made in Petitioner's "Statement" and since brief examination of the procedures followed by Respondent throughout this litigation will make evident the reasons why certiorari should be denied, it is appropriate to outline these facts at the outset:

1. On June 3, 1954, Respondent and Petitioner entered into two agreements under which the latter was granted a license to exhibit specified motion picture films over its television facilities in Midland, Texas. These agreements, substantially identical in all relevant respects,[1] each contained, among others, the following significant provisions:

> "Any and all disputes which shall arise from this agreement, its interpretation or performance, shall be submitted to arbitration under the current rules and regulations of the American Arbitration Association, and the decision of the arbitrator shall be binding and conclusive upon both parties."
>
> * * * * *
>
> "This agreement shall be construed under the laws of the State of New York."
>
> * * * * *
>
> "This contract is not binding on Motion Pictures for Television, Inc. until approved by its home office and signed or countersigned by one of its officers."

[1]Hereafter referred to as "the contract". See R. 28.

[Plaintiff's Exhibit "p-3", forwarded to the Court of Appeals by Order of the District Court (R. 121).]

2. The contract was honored by the Petitioner for approximately one year (R. 94) but thereafter, in a timely manner, the Respondent claimed its breach by Petitioner for the failure on the latter's part to make the payments required to be made under the contract, and, in conformity with the rules of the American Arbitration Association the Respondent made demand upon Petitioner for arbitration (R. 50).

3. The Petitioner, although it had received due notice of the arbitration hearing (Stipulation, R. 48) failed to make answer or to participate in the hearing.

4. Thereafter, in conformity with the rules of the Association and with the statutes of the State of New York, such hearing was had before three arbitrators on April 1, 1958, the Petitioner having received due notice of such hearing (Stipulation, R. 48, R. 51).

5. On or about April 3, 1958, an award was entered by the arbitrators in favor of the Respondent herein (Stipulation, R. 48; R. 53) and thereafter the Notice of Motion (R. 89) and Petition (R. 91) were filed in the Supreme Court of New York pursuant to *Article 84, Section 1462-A of the Civil Practice Act of the State of New York* (R. 73) and in conformity with the arbitration statutes of that state, seeking modification and correction of the award and leave to enter judgment in the amount of the award, as corrected, with costs.

6. The Notice of Motion and Petition were duly served on the Defendant (Petitioner herein) by mail (R. 106) in accordance with Section 39 of the Rules of the American Arbitration Association (Stipulation, R. 47) by which the parties contracted to be bound, and *Article 84* of the *Civil Practice Act* of the State of New York (R. 56). *Petitioner has never denied receipt of this Notice of Motion and Petition.*

7. The arbitration award was corrected and modified, as prayed, by Order of the Supreme Court of the State of New York (R. 108) directing the Clerk to enter judgment in favor of the Respondent herein.

8. Pursuant to such order, judgment was duly entered in favor of Respondent (R. 83), from which no appeal was taken by Petitioner herein (Stipulation R. 46). It is upon this final judgment issuing from the Supreme Court of the State of New York, County of New York, that Respondent's present action is founded.

9. The summary judgment entered by the United States District Court for the Western District of Texas in favor of Respondent herein, Plaintiffs below, was correctly affirmed by the United States Court of Appeals for the Fifth Circuit.

Petitioner was thus fully aware of the details of the correction of the arbitration award, as urged by Respondent, and was likewise aware of the procedures to be followed under the New York Civil Practice Act, as well as all forms of relief to be urged by Respondent in the New York Court. Nevertheless, for reasons best known to itself, Petitioner chose to ignore the proceeding in the New York Court and made no opposition thereto.

ARGUMENT

Although the Petitioner never clearly states what allegations of "fraud" it urges as a basis for relitigating the New York proceeding, it is quite apparent, from Petitioner's innuendo, that the only "fraud" it could possibly be asserting is in the procedures followed by Respondent to obtain the New York judgment. Thus Petitioner has posed, in its "Questions Presented for Review" various questions, which under

the facts of this case, are essentially hypothetical and irrelevant. Try as Petitioner may, the questions urged upon this Court for review cannot be disassociated from the facts of the case. The record herein speaks for itself and clearly demonstrates (as the District Court and Court of Appeals found) that there was no "fraud".

Still another reason for denying certiorari is that the case, on its facts, is unique and does not present matters of general interest. Finally, any questions of law necessary to the determination of this case involve settled principles of law concerning the full faith and credit clause of the Federal Constitution and the decision of the Court of Appeals conflicts with neither decisions of the United States Supreme Court or other Courts of Appeals.

The Lower Courts Have Resolved the Issue of "Fraud"

Having by deliberate omission failed to present any defense in the arbitration proceeding, and having likewise ignored the action of the New York Court to correct and reduce the award to judgment, the Petitioner seeks to attack collaterally the New York judgment by the device of improvised wholesale allegations of "fraud". When stripped of argumentative and imaginative verbiage, Petitioner's complaint (and its petition for certiorari) seems to devolve essentially into an expression of dissatisfaction with the *New York Civil Practice Act*, and, in essence, charges that the pursuit by Respondent of the remedies provided by the *New*

York Civil Practice Act, and particularly *Section 1462-A* thereof (R. 73), is somehow fraudulent.

Respondent complied meticulously with every procedural requirement of the contract between the parties and the New York Civil Practice Act. It is noteworthy that Petitioner does not presume to charge that due process of law was not accorded it.

Article 84, Section 1462-A of the Civil Practice Act of the State of New York (R. 73) sets out specifically the authority of the Courts of New York to modify and correct an arbitration award under circumstances under which such correction must be made. *Section 1461* of said Act (R. 71) deals with the motion to confirm an arbitration award, making note of the provisions of the Act for modification or correction of the award. *Section 1463* of said Act (R. 71) deals with the notice of a motion to modify or correct an award; and *Section 1464* of said Act (R. 74) deals with entry of judgment upon the granting of an order confirming, modifying or correcting an award. Petitioner received every notice of the New York proceeding required by the laws of that state by which Petitioner contracted to be bound including the Notice of Motion (R. 89) and Petition (R. 91) which latter sets forth in elaborate detail the matters urged to the Court to support Respondent's position that the arbitrators had made an evident miscalculation in their award. The matters urged therein relate to the question of damages which are matters *intrinsic* in the judgment. The measure of damages applied, far from being fraudulent, is hornbook law and is as basic in contract law as *Hawkins v. McGee, 84 NH 114,*

146 A 641. The amount of the judgment obtained is *res judicata* having been conclusively determined by the New York Court. *Morris v. Jones, 329 U. S. 545, 91 L. Ed. 488, 496, 497, 498.* That Petitioner chose not to offer opposition to the aforesaid Notice of Motion and Petition is no reason for this Court to invoke its jurisdiction.

If it not be fraudulent to follow the laws and procedures by which Petitioner contracted to be bound, then Petitioner's Questions Nos. 2 and 3 offer no basis for a writ of certiorari and should be ignored—just as Petitioner, after all due notice, ignored the proceedings of the New York Court. Any other action would constitute a mockery of the full faith and credit clause of the Federal Constitution.

With the possible exception of Petitioner's quarrel with the *Civil Practice Act of the State of New York*, as heretofore discussed, relating to the procedures specified for modifying and correcting an arbitration award, Petitioner is understandably vague and evasive as to its alleged grounds of "fraud" suggested in its Question No. 1. They may be examined by reference to Defendant's Original Answer at R. 10. The first three of such charges at least are matters obviously going to the merits of the previous controversy or are defensive matters which would have been proper only in the New York proceeding. These are not proper matters of inquiry in the present case as they attempt, brazenly, a collateral attack on the New York judgment. The fourth matter set out as a purported allegation of "fraud", as best Respondent can determine, relates to any representation made by Respondent to the New York Court that that Court had

jurisdiction to enter a personal judgment against Petitioner. The basis of the New York Court's jurisdiction has been outlined in the "Statement" of this brief, supra, but the question of jurisdiction is not before this Court.

The "Fraud" Alleged Was Intrinsic

Even if it could be conceded that the allegations of the Petitioner set out any matters sufficiently specific that could be given the dignity of consideration by this Court, a Federal Court of Equity will not grant relief against a judgment obtained by fraud unless it appears that the fraud was *extrinsic, that is, prevented a trial of the issues determinative of the controversy. U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; U. S. v. Beebe, 180 U. S. 343, 45 L. Ed. 563.* Clearly, the matters alleged by the Petitioner are *intrinsic* in nature. The Petitioner had every opportunity to litigate the case in New York, but failed through neglect or deliberate omission to do so and was not prevented from doing so by any act of Respondent.

The Cases Cited by Petitioner Are Not in Point

Petitioner relies, as a basis for jurisdiction of this Court, as well as a basis for review, upon certain dictum contained in *Morris v. Jones, 329 U. S. 545, 91 L. Ed. 488*, supra; and in *Cole v. Cunningham, 133 U. S. 107, 33 L. Ed. 538.* For the determination of this case, no resolution of such language with the dictum or holdings of other cases is necessary in

view of Petitioners' failure to allege any basis of fraud of any substance or legal effect, and its allegations, at best, being defensive matters *intrinsic* in the New York judgment, which, if Petitioner could have asserted the same in good faith, should have done so in the New York forum. However, this Court has repeatedly held as it did in *Hanley v. Donoghue, 116 U. S. 1, 4 (29:535, 537)* where Mr. Justice Gray stated as follows:

> "Judgments recovered in one state in the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of *not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.*" Citing Buckner v. Finley, 27 U. S. 2 Pet. 592 (7:531); M'Elmoyle v. Cohen, 38 U. S. 13 Pet. 312,324 (10:177, 183); D'Arcy v. Ketchum, 52 U. S. 11 How. 165, 176 (13:648, 653); Christmas v. Russell, 72 U. S. 5 Wall. 290, 305 (18:475, 480); Thompson v. Whitman, 85 U. S. 18 Wall. 457 (21:897).

The Court held similarly in the following cases: *Simmons v. Saul, 138 U. S. 439, 34 L. Ed. 1054, 1062; Wisconsin v. Pelican Insurance Company of New Orleans, 127 U. S. 265, 32 L. Ed 239, 244; Maxwell v. Stewart, 21 Wall 71, 22 Wall 77, 22 L. Ed. 564; Christmas v. Russell, 5 Wall 290, 18 L. Ed. 475, 479.*

The allegations of Petitioner set out no valid or tenable basis for a collateral attack upon the judgment of the New York Court, and the New York Court having had jurisdiction of the cause and of the parties, its judgment is conclusive

as to all matters of controversy between them and is entitled to the same faith, credit and respect in the present case as it was accorded in the state where rendered. *Milliken v. Meyer, 311 U. S. 457, 85 L. Ed. 278; Magnolia Petroleum Company v. Hunt, 320 U. S. 430, 88 L. Ed. 149.*

In view of the foregoing, it is clear that Petitioners' urging of purported conflict of holdings beeween Courts of Appeals as a basis of jurisdiction is of no effect and the cases cited by Petitioner are not to point and are readily distinguishable. Further, Petitioners' argument regarding New York law in its second point does not withstand scrutiny as matters intrinsic in the New York judgment were necessarily concluded by the New York Court and are *res judicata*. The New York Court having had jurisdiction of the cause and the parties, was quite competent to determine the procedural and substantive requirements of the *New York Civil Practice Act*—as it did, conclusively.

Petitioner has not, nor can it, truthfully allege that the procedures prescribed by the New York Statutes were not followed by Respondent meticulously, nor that it did not receive every notification required by the rules of the American Arbitration Association and under the laws of the State of New York by which it agreed by contract to bound. Petitioner has not, nor can it, allege any action taken by Respondent that prevented a trial of the issues of the case in the New York proceedings. It suffices to say that if the purported allegations of "fraud" upon which Petitioner relies

should ever be held sufficient for a collateral attack upon a judgment, there is no judgment conceivable which would be immune to relitigation and which would be entitled, in fact, to full faith and credit under the Federal Constitution.

Had it chosen to do so, the Petitioner could have raised in the New York court all of the matters and purported defects which it now attempts to assert collaterally in this suit on the New York judgment. It could have stayed arbitration proceedings pending a determination before a jury of the validity of the underlying agreements. *Article 84, Sections 1450 and 1451, Civil Practice Act* (R. 60, 62). It could have opposed the confirmation of the result and award by an application to the Supreme Court of New York. It could have obtained a judicial review of the actual conduct and propriety of the proceedings. *Article 84, Section 1462, Civil Practice Act* (R. 72). It could have appealed from the final judgment entered in the Supreme Court of New York, *Article 84, Section 1466, Civil Practice Act*, (R. 75), or have directly attacked the judgment. But the Petitioner did none of these things. Instead, it allowed formal proceedings to be instituted and conducted before an arbitration tribunal; it chose to ignore and failed to participate in the proceedings despite due notice thereof; it allowed the Respondent to present formal proof before the arbitration tribunal and a formal record to be made; it received due notice that the Respondent intended to move to correct and reduce to judgment the arbitration award before the Supreme Court of the State of New York,

but it failed to oppose the motion; and, finally, it allowed the judgment to be entered without protest and the time for appeal to expire. In short, the Petitioner took no step to present its legal contentions or its claims to the arbitration tribunal or to any court until after judgment was entered in conformity with the laws of the State of New York—the very laws which the Petitioner itself agreed to apply and respect in the underlying agreements—and until after suit was brought on the judgment in the United States District Court for the Western District of Texas. All disputes between the parties are *res judicata;* the jurisdiction was properly founded and not subject to collateral attack by reason of the nebulous allegations of the Petitioner, and the judgment of the New York court must be given full faith and credit as required by the Constitution.

CONCLUSION

In an effort to attack collaterally the final New York judgment, the Petitioner has in this case alleged as fraudulent the meticulous compliance with the New York Statutes by which the parties are bound, and has alleged other matters which it would now like to litigate upon collateral attack, having chosen not to do so in a timely manner and in the proper forum. The New York judgment is now final and must be given full faith and credit as required by the Federal Constitution, all matters in relation to such judgment being *res judicata.*

The decision below was clearly correct, and any contrary result, as urged by the Petitioner, would effectively nulify *Article IV, Section 1 of the Constitution*. We respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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July, 1961

CERTIFICATE OF SERVICE

A copy of this Brief for the Respondent in opposition has been mailed to the opposing attorney of record, Mr. W. B. Browder, Jr. of the firm of Stubbeman, McRae, Sealy & Laughlin, P. O. Box 670, Midland, Texas. Such brief was placed in the United States mail and with proper postage thereon on the 26th day of July, 1961.

THOMAS O. McWHORTER